

An out-of-State retailer maintaining a place of business in this State is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. (This is a GIL).

August 25, 2000

Dear Xxxxx:

This letter is in response to your letter dated June 14, 2000. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be found on the Department's Web site at www.revenue.state.il.us/legalinformation/regs/part1200.

In your letter, you have stated and made inquiry as follows:

We COMPANY are writing to request clarification regarding the application of sales tax to our business. Following are pertinent facts:

1. We are incorporated in the state of STATE only
2. All payroll, employees, offices, telephone lines, and salespersons, are in STATE only
3. Salespersons do not travel more than seven days in one calendar year to any one state
4. All products we purchase are for resale in the regular course of business, with the exception of office and packing supplies
5. Our company specializes in warehouse and fulfillment of products for businesses throughout the United States
6. We are manufacturers representatives for numerous product lines
7. We develop and implement promotional and incentive award programs
8. Companies purchase product from us and we ship goods to their customers/employees

Our purpose in writing is to determine whether or not COMPANY must register and obtain a sales tax identification number from your state. We would also like to know if any of the following scenarios create a sales tax liability for us:

- A. We purchase goods for resale from a company in your state to be
 1. shipped to us in STATE
 2. drop shipped to
 - a. your state
 - b. another state

B. We sell to a company in your state with delivery

1. to your state
2. to another state

If it is determined that we must register with your state please include, with your response, the appropriate application.

We appreciate your help with this matter.

Illinois taxes the retail sale and use of tangible personal property under two separate but related statutes. The Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2 (1998 State Bar Edition). The Use Tax Act imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. 35 ILCS 105/3 (1998 State Bar Edition).

An Illinois retailer is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois retailer is liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by purchasers.

The definition of a "retailer maintaining a place of business in Illinois" is set forth at 86 Ill. Adm. Code 150.201(i), see enclosed. An out-of-State retailer maintaining a place of business in this State is required to register with the State as an Illinois Use Tax collector. See the enclosed copy of 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of its Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The final type of retailer is simply the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax law. A retailer in this situation does not incur Retailer' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's sales tax laws. The Supreme Court has set out a two-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due Process will be satisfied if the person or entity purposely avails himself or itself of the benefits of an economic market in a forum state. *Id.* at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause.

A physical presence does not mean simply an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative and it is immaterial for tax purposes that the representative's presence is temporary.

Please find enclosed a copy of 86 Ill. Adm. Code 130.605 concerning Sales of Property Originating in Illinois. Subsection (b) of this regulation states that Retailers' Occupation Tax does not apply where the seller is obligated, under the terms of his agreement with the purchaser, to make physical delivery of the goods from a point in Illinois to a point outside Illinois, not to be returned to a point within Illinois, provided that such delivery is actually made. In addition, subsection (c) states that Retailers' Occupation Tax does not apply where the seller ships goods by carrier or by mail, according to the terms of the agreement with the purchaser, and the seller delivers the goods from a point in Illinois to a point outside Illinois not to be returned to a point within Illinois. Such sales are considered to be sales in interstate commerce and are exempt from Retailers' Occupation Tax. However, there may be a tax liability in the other state involved in the transaction. Illinois has no authority to interpret the sales tax laws of other states.

In a drop-shipment situation, an out-of-State seller registered with Illinois (Company A) makes a sale to another out-of-State company that is not registered with Illinois (Company B) and drop-ships the items to Company B's customer (Company C) located in Illinois.

As an out-of-State seller required to collect the Illinois tax, Company A must either charge tax or document an exemption when it makes a delivery in Illinois. In order to document the fact that its sale to Company B is a sale for resale, Company A is obligated under Illinois law to obtain a valid Certificate of Resale from its customer, Company B. Certificates of Resale must contain the following information:

1. a short statement from the purchaser (Company B) that the items are being purchased for resale;
2. seller's (Company A's) name and address;
3. purchaser's (Company B's) name and address;
4. purchaser's signature and date of signing;
5. a sufficient identification of the items purchased for resale; and
6. purchaser's registration number with the Illinois Department of Revenue, or purchaser's resale number issued by the Illinois Department of Revenue.

If Company B has no nexus whatsoever with Illinois, it is unlikely that Company B would be registered with Illinois. If that is the case, and if Company B has no contact with Illinois that would require it to be registered as an out-of-State Use Tax collector for Illinois, then Company B could obtain a resale number that would provide it the wherewithal to supply a required number to

Company A in conjunction with a Certificate of Resale. We hope the following descriptions of out-of-State sellers required to register, either as Illinois retailers or as out-of-State Use Tax collectors and persons who qualify for resale numbers will be useful.

Assuming a delivery in Illinois, an Illinois retailer is anyone who either accepts purchase orders in Illinois or who sells items of tangible personal property that are located in Illinois at the time of sale. See 86 Ill. Adm. Code 130.605(a), enclosed. So long as Company B does not accept purchase orders in Illinois, and so long as the items it sells are not located in Illinois at the time it sells them, it need not register as a retailer.

Out-of-State sellers who fall under the definition of a "retailer maintaining a place of business in this State" (see 86 Ill. Adm. Code 150.201(i), enclosed) must register to collect Illinois Use Tax from Illinois customers and remit that tax to the Department. See 86 Ill. Adm. Code 150.801(c), enclosed. Please note that out-of-State sellers with any kind of agent in Illinois (not just sales or lease agents) are required to register as out-of-State Use Tax collectors. If Company B has no contact with Illinois, it does not fall within the definition of a "retailer maintaining a place of business in this State," and it need not register as an out-of-State Use Tax collector.

Resale numbers are issued to persons who make no taxable sales in Illinois but who need the wherewithal to provide suppliers with Certificates of Resale when purchasing items that will be resold. So long as Company B does not act as an Illinois retailer and, so long as it does not fall under the definition of a "retailer maintaining a place of business in this State," its sales to Illinois customers are not subject to Illinois Retailers' Occupation Tax liability and it cannot be required to act as a Use Tax collector. So long as this is true, Company B qualifies for a resale number that does not require the filing of tax returns with the Illinois Department of Revenue.

Please note that the fact that Company B may not be required to act as a Use Tax collector for Illinois does not relieve its Illinois purchaser of Use Tax liability. Therefore, if Company B does qualify for a resale number, Company C would have to pay its tax liability directly to the Illinois Department of Revenue.

Illinois legislation has modified the requirements of Certificates of Resale. While active registration or resale numbers on Certificates of Resale are preferred, Section 2c of the Retailers' Occupation Tax Act provides as follows:

"Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sales for resale, or that a particular sale is a sale for resale."

Again, a registration or resale number from Company B on a Certificate of Resale is the preferred method for documenting that its purchase from Company A is a purchase for resale. However, in light of this statutory provision, a certification from Company B on a Certificate of Resale in lieu of a resale number that described the drop-shipment situation and the fact that Company B has no contact with Illinois that would require it to be registered and that it chooses not to obtain an Illinois

resale number would constitute evidence that this particular sale is a sale for resale despite the fact that no registration number or resale number is provided. See 86 Ill. Adm. Code 130.1405(d), enclosed. The risk run by Company A in accepting such a certification and the risk run by Company B in providing such a certification is that an Illinois auditor is much more likely to go behind a Certificate of Resale that does not contain a valid resale number and require that more information be provided by Company A as evidence that the particular sale was, in fact, a sale for resale.

While the above method is permitted under law, it is not recommended. Therefore, as the seller, Company A runs the risk of incurring liability on such sales. It is the purchaser's responsibility to properly document an exemption. If Company A, as the seller, does not feel as though such "other evidence" is sufficient to document the sale for resale, and to subsequently protect its interests, Company A may charge tax, the same way it does when any other customers fail to meet their obligation of documenting an exemption.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Gina Roccaforte
Associate Counsel

GR:msk
Enc.